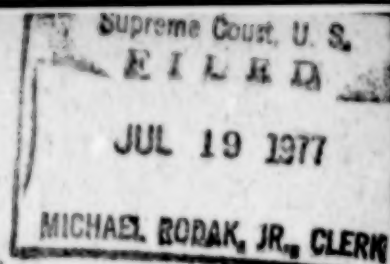


No. 76-1642



In the Supreme Court of the United States

OCTOBER TERM, 1977

SEARS, ROEBUCK AND CO., PETITIONER

v.

GENERAL SERVICES ADMINISTRATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 553 F. 2d 1378. An earlier opinion of the court of appeals, dissolving a temporary stay pending appeal, is reported at 509 F. 2d 527 (Pet. App. C). The memorandum opinions of the district court are reported at 384 F. Supp. 996 (Pet. App. B), and 402 F. Supp. 378 (Pet. App. E).

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1977. The petition for a writ of certiorari was filed on May 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether confidential statistical data contained in a private employer's EEO-1 reports and related affirmative action plans are exempt from mandatory disclosure under exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and 18 U.S.C. 1905.

2. Whether Section 709(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(e), and 44 U.S.C. 3508(a) bar a federal agency other than the Equal Employment Opportunity Commission from disclosing a private employer's EEO-1 reports.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at Pet. 3-4.

STATEMENT

1. Petitioner brought this action in federal district court seeking to enjoin the federal respondents¹ from complying with a Freedom of Information Act request by respondent Council on Economic Priorities for the disclosure of certain documents that petitioner had furnished to the federal respondents pursuant to its contractual obligation to be an equal opportunity employer. See Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303.²

¹The federal respondents are the General Services Administration and its Administrator and Director of Civil Rights, the Secretary of Labor, and the Director of the Office of Federal Contract Compliance of the Department of Labor.

²The Secretary of Labor, who is vested with overall responsibility for implementing the equal employment opportunity program established by the Executive Order, has delegated administrative responsibility to the Director of the Office of Federal Contract Compliance (OFCC). 41 C.F.R. 60-1.2. In turn, the Director has

The documents at issue are Equal Employment Opportunity Forms 100 (EEO-1's) and Affirmative Action Plans (AAP's), which government contractors are required to submit to the federal respondents to aid in monitoring compliance with the federal government's equal employment opportunity program. See 41 C.F.R. 60-1.7(a); 41 C.F.R. 60-1.40, 60-2.1, 60-60.2(a).

In the district court, petitioner claimed that disclosure of the documents was prohibited by various statutes (Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 264, 42 U.S.C. 2000e-8(e); 44 U.S.C. 3508; and 18 U.S.C. 1905) operating through exemption 3 of the FOIA,³ as well as by exemptions 4, 6 and 7 of the Act.⁴ Respondent Council on Economic Priorities was permitted to intervene as a party defendant.

designated various federal agencies as "compliance agencies" and has delegated to each of them primary responsibility for assuring adherence to the equal employment opportunity program by contractors within certain geographical areas or industrial classifications. See 41 C.F.R. 60-1.6. Respondent General Services Administration (GSA) is the compliance agency for petitioner.

³Exemption 3, 5 U.S.C. 552(b)(3), as amended (Pub. L. 94-409, 90 Stat. 1247, effective March 12, 1977), provides that the mandatory disclosure provisions of the FOIA do not apply to matters that are:

Specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

⁴Exemption 4 provides that the requirement of mandatory disclosure in the FOIA "does not apply to matters that are— * * * trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Exemption 6 applies to information the disclosure of which would constitute "a

In its initial decision (Pet. App. B), the district court rejected petitioner's claims that disclosure of the documents in issue was precluded by Section 709(e), 44 U.S.C. 3508, 18 U.S.C. 1905, or exemption 7, and as to those issues granted summary judgment to respondents (Pet. App. B, pp. 5-12). With respect to petitioner's claims that portions of the documents were not disclosable under exemptions 4 and 6, the court ruled that the case was "not yet ripe for summary judgment" (Pet. App. B, pp. 12-16). Since petitioner had never specified at the agency level which portions of the documents it believed were covered by those exemptions, the court stayed proceedings on petitioner's claims under exemptions 4 and 6 pending further agency review (Pet. App. B, p. 15).

Petitioner obtained a temporary stay from the court of appeals of the portions of the district court's judgment adverse to it, and appealed. After further consideration, the court of appeals dissolved the stay, stating that petitioner had failed to show a likelihood of success on the merits (Pet. App. C). The court ordered the federal respondents "to release forthwith all of the information sought herein which * * * [petitioner] has not specified as exempt under FOIA exemptions (b)(4) and (b)(6)" (Pet. App. C, p. 5). In view of that order, the court of appeals dismissed the appeal as moot (Pet. App. D).

2. As directed by the district court (see *supra*), respondent GSA considered petitioner's claims under exemptions 4 and 6. After considering all submissions, the

clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7 protects investigatory records compiled for law enforcement purposes, "but only to the extent that the production of such records * * * would result in certain specific harms. 5 U.S.C. 552(b)(7).

agency concluded that, for the most part, petitioner had failed to establish that any portions of the documents in issue were covered by these exemptions.⁵

Petitioner thereafter reinstated its case in the district court to challenge this conclusion. The district court rejected petitioner's claims and granted summary judgment for the Council on Economic Priorities and, in part, for the federal respondents (Pet. App. E). The court concluded that exemption 4 was inapplicable because petitioner had not sustained its burden of showing that release of any information in the EEO-1 reports and AAP's in question was likely to cause it substantial competitive harm (Pet. App. E, pp. 6-8).⁶ Relying on the court of appeals' earlier ruling in the case, the district court rejected petitioner's reasserted argument that disclosure was prohibited by 18 U.S.C. 1905 (Pet. App. E, p. 3, r. 3).

On petitioner's second appeal, the court of appeals reversed and remanded the case to the district court for further proceedings (Pet. App. A). The court of appeals held that summary judgment on the exemption 4 issue was

⁵Respondent GSA, while rejecting petitioner's exemption 4 claims in their entirety, did conclude that certain limited portions of the documents were covered by exemption 6, and on that basis it determined not to disclose those portions. See 41 C.F.R. 60-40.3(a)(2).

⁶With respect to petitioner's exemption 6 claim, the district court noted that no one sought disclosure of the names, addresses, and phone numbers of persons referred to in the documents and held that the right of privacy of the affected individuals with respect to any other identifying information was outweighed by the public interest in disclosure (Pet. App. E, pp. 8-10). The court of appeals subsequently affirmed the district court's ruling on this issue (Pet. App. A, pp. 7-8).

inappropriate since material facts remained in dispute (Pet. App. A, pp. 4-7).

The court of appeals did not decide whether disclosure was barred by 18 U.S.C. 1905 and exemption 3. The court noted that the law on this issue is unsettled⁷ and that petitions for writs of certiorari raising the issue (as well as other questions) were pending before this Court. The court of appeals determined that under these circumstances it would be inadvisable to express an additional view (Pet. App. A, p. 11; footnotes omitted):

Rather, since we are remanding this case to the District Court for a reconsideration of the issue under exemption 4, we are confident that the District Judge will himself give whatever reconsideration of § 1905 and exemption 3 is called for by the actions of the Supreme Court on the aforementioned pending matters. * * * [L]acking decisive new guidance by the Supreme Court, the District Court is free to reconsider its view in light of all that has taken place subsequent to its original decision.

⁷Although in an earlier case the court of appeals had held that 18 U.S.C. 1905 was not a statute barring disclosure for purposes of exemption 3 (e.g., *Charles River Park "A", Inc. v. Department of Housing and Urban Development*, 519 F. 2d 935, 941 n. 7 (C.A. D.C.)), in this case the court noted that since then this Court had decided *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, and Congress thereafter had amended exemption 3 (Pub. L. 94-409, 90 Stat. 1247) with the announced intention of overriding the Court's interpretation of that provision (see note 9, *infra*). The court of appeals also recognized that in *National Parks and Conservation Ass'n. v. Kleppe*, 547 F. 2d 673 (C.A. D.C.), it had in *dicta* reaffirmed the view that Section 1905 was not an exemption 3 statute, but that that view conflicted with the ruling of the Fourth Circuit in *Westinghouse Electric Corporation v. Schlesinger*, 542 F. 2d 1190, 1203, certiorari denied *sub nom. Brown v. Westinghouse Electric Corporation, et al.*, No. 76-1192, May 16, 1977.

ARGUMENT

This case is another of an increasing number of so-called "reverse FOIA" suits by private parties seeking to enjoin the federal government from complying with FOIA requests. As noted in the government's petition for a writ of certiorari in *Brown v. Westinghouse Electric Corporation, et al.*, No. 76-1192, certiorari denied, May 16, 1977, such cases raise important questions concerning the purposes of the FOIA, its use by private parties to obtain judicial relief against the disclosure of information, and the role of the executive branch in discharging the legislative directive, affirmatively expressed in the Act, to permit the fullest responsible disclosure. However, the questions presented by the petitioner here either do not touch upon these fundamental concerns or, in the present posture of the case, are not ripe for review by this Court.⁸

1. Although presented separately, petitioner's two questions relating to 18 U.S.C. 1905 (Pet. 2) can be reformulated as one, *i.e.*, whether 18 U.S.C. 1905 is comprehended by exemption 3 of the FOIA so that information within its coverage is both exempt from mandatory disclosure under the FOIA and nondisclosable. Since the court of appeals expressly reserved judgment on this question, petitioner's attempt to present it to this Court is premature.

Moreover, petitioner's claim (Pet. 9) that the courts of appeals are divided on the question is incorrect. While

⁸This Court recently denied the petition for a writ of certiorari before judgment in *The Prudential Insurance Co. of America, et al. v. National Organization for Women, Washington, D.C., et al.*, No. 76-1052, certiorari denied, May 16, 1977, in which virtually identical questions were presented for review.

at one time there was such a conflict (compare *Sears, Roebuck and Co. v. General Services Administration*, 509 F. 2d 527, 529 (C.A.D.C.), with *Westinghouse Electric Corporation v. Schlesinger*, *supra*, 542 F. 2d at 1203), the District of Columbia Circuit in this case receded from its earlier view. The court of appeals stated that in due course it will undertake to reconsider whether 18 U.S.C. 1905 is an exemption 3 statute (Pet. App. A, pp. 8-11), and it remanded the case to the district court with the instruction that it "is free to reconsider" the question (Pet. App. A, p. 11). Furthermore, the Fourth Circuit's decision in *Westinghouse Electric* does not appear to give consideration to a recent amendment to exemption 3 (see notes 3 and 7, *supra*) that was passed before the case was decided but had not yet become effective.⁹ See 542 F. 2d at 1196 n. 7. The Fourth Circuit has since had no occasion to reconsider its holding in light of the new wording of the statute.

Accordingly, neither the Fourth Circuit nor the District of Columbia Circuit can be said to have ruled definitively on the question petitioner would have this Court consider and it is therefore unnecessary at this time for the Court to settle the question.¹⁰

⁹The Fourth Circuit, in holding that 18 U.S.C. 1905 is an exemption 3 statute, relied in large measure upon this Court's decision in *Administrator, Federal Aviation Administration v. Robertson*, *supra*. But the express congressional purpose of the recent amendment to exemption 3 was to effect a legislative overruling of the specific holding in *Robertson*. See H.R. Rep. No. 94-1178, 94th Cong., 2d Sess. 14 (1976).

¹⁰It is not clear in any event what practical significance this issue has for this or any other reverse FOIA case. 18 U.S.C. 1905 prohibits disclosure of certain categories of information unless otherwise authorized by law. It is the government's position that the disclosure regulations of the OFCC, 41 C.F.R. Part 60-40, which

2. The other question presented by petitioner is whether Section 709(e) and 44 U.S.C. 3508 prohibit the federal respondents from disclosing its EEO-1 reports.¹¹ Section 709(e) prohibits the disclosure by "any officer or employee of the [Equal Employment Opportunity] Commission" of information "obtained by the Commission pursuant to its authority * * * [under the Civil Rights Act of 1964]." 42 U.S.C. 2000e-8(e). However, as both the district court and the court of appeals pointed out (Pet. App. C, pp. 3-4; Pet. App. B, pp. 6-9), none of the documents at issue were obtained by the Equal Employment Opportunity Commission or under the authority of the Civil Rights Act of 1964. Instead, the EEO-1 reports at issue were obtained by respondent GSA pursuant to Executive Order 11246 and the regulations promulgated thereunder (41 C.F.R. Part 60). Moreover, none of the federal respondents is an "officer or employee of the Commission." Thus, the courts below correctly held that Section 709(e) by its own terms has no bearing upon the

govern the release of the documents involved here, provide the necessary authorization. If we are correct, it is immaterial whether exemption 3 incorporates 18 U.S.C. 1905.

Moreover, much of what petitioner would have protected from mandatory disclosure by exemption 3's incorporation of 18 U.S.C. 1905 would also be protected from mandatory disclosure by exemption 4. To the extent that information of the character described in 18 U.S.C. 1905 is exempt from mandatory disclosure by exemption 4, there is no need to determine whether the information also is protected by exemption 3.

¹¹The court of appeals indicated its dim view of the merits of petitioner's Section 709(e) claim in its December 9, 1974, opinion dissolving the temporary stay (Pet. App. C, pp. 3-4). There was no mention of that issue in the court of appeals' most recent decision in the case.

disclosability of the documents at issue in this case.¹² There is no conflict among the courts of appeals on this issue.¹³ See *Westinghouse Electric Corporation v. Schlesinger*, *supra*, 542 F. 2d at 1199.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1977.

¹²Similarly, the courts below correctly held that 44 U.S.C. 3508 also was inapplicable (Pet. App. C, p. 4; Pet. App. B, p. 8). That statute prohibits officials of one government agency from disclosing information received from another agency, where the transmitting agency is itself prohibited from publicly disclosing the information. Here, GSA did not receive petitioner's EEO-1 reports from the Commission, which is bound by the nondisclosure provision in Section 709(e), but, rather, from the Joint Reporting Committee, which is not bound by any such provisions. Accordingly, 44 U.S.C. 3508 does not make Section 709(e) applicable to this case.

¹³Justice Douglas once expressed the view that there is "a substantial question" concerning the applicability of Section 709(e) to cases like this one. *Chamber of Commerce v. Legal Aid Society*, 423 U.S. 1309, 1311-1312 (in chambers). That question, however, has been decided against petitioner's contentions by all the courts that have squarely faced it.